Office - Supreme Court,
FILED
JAN 3 1953
HAROLD B. WILLEY, C

Supreme Court of the United States

OCTOBER TERM, 1952

No. 455

NORTHERN PACIFIC RAILWAY COMPANY, GREAT NORTHERN RAILWAY COMPANY, CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY, ET AL., *Appellants,*

vs.

STATE OF MONTANA, BOARD OF RAILROAD COMMISSIONERS OF THE STATE OF MONTANA, ET AL., *Appellees.*

PETITION FOR REHEARING

ARNOLD H. OLSEN,
Attorney General of the State of Montana;

H. M. BRICKETT,
Assistant Attorney General of the State of Montana;

EDWIN S. BOOTH,
Secretary-Counsel of the Board of Railroad Commissioners of the State of Montana and Special Assistant Attorney General of the State of Montana,

Counsel for Appellees.

INDEX

Subject Index

	Page
I. Preliminary Statement	2
II. The Remanding of This Case for Further Proceedings in Light of the King Case, Considering the Decision of the District Court, Is Erroneous	3
III. The Decision in the Instant Case Is in Harmony with Controlling Decision and the Motion to Affirm Should Be Granted or in the Alternative the Case Should Be Placed on the Docket for Oral Argument	7
Conclusion	9
Certificate of Counsel	9

Table of Cases Cited

Illinois Commerce Commission v. United States, 292 U. S. 475	6
Increases in Florida Intrastate Rates, 278 I. C. C. 41	8
King, et al., v. United States, et al., 101 F. Supp. 941	3
King v. United States, U. S. Sup. Ct. (decided December 22, 1952)	2, 3, 6, 7, 8
Montana, et al., v. United States, et al., (106 Fed. Supp. 778 and 786)	3, 4, 5
Montana Intrastate Freight Rates and Charges, 284 I. C. C. 167	6
North Carolina v. United States, 325 U. S. 507	6, 7, 8

Statutes Cited

5 U. S. C. A. 1007b	5
49 U. S. C. A. 13	2, 3, 6, 7, 8
49 U. S. C. A. 15a	7

Supreme Court of the United States

OCTOBER TERM, 1952

No. 455

NORTHERN PACIFIC RAILWAY COMPANY, GREAT NORTHERN RAILWAY COMPANY, CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY, ET AL., *Appellants,*

vs.

STATE OF MONTANA, BOARD OF RAILROAD COMMISSIONERS OF THE STATE OF MONTANA, ET AL., *Appellees.*

PETITION FOR REHEARING

The above named appellees, the State of Montana, Board of Railroad Commissioners of the State of Montana and the individual members of said Board, present this, their petition for reconsideration and rehearing of the above entitled cause, disposed of by order delivered December 22, 1952, wherein the judgment is vacated and the case remanded to the District Court for further proceedings in light of *King vs. United States,* No. 9, October Term 1952, decided December 22, 1952. In support of their petition, appellees respectfully show:

I.
Preliminary Statement

Both the King Case and this Case arise by reason of the respective State Commissions of Georgia and Montana refusing to grant identical increases intrastate as were granted interstate in some of the Ex Parte general increase cases occurring since 1946. The actions were brought under Sec. 13 (3) and 13 (4) of the Interstate Commerce Act. In the King Case, the State of Florida argued that passenger deficits should not be considered in determining the right of the Interstate Commerce Commission to increase intrastate freight rates. The Court's discussion of this matter and its decision against the state contention is found on pages 5 to 12 of the advance printed opinion. No similar contention has been made in the instant case and we may therefore disregard that point so far as the present case is concerned.

Section 13 (4) of the Interstate Commerce Act provides two conditions when the Federal Commission may order state rates increased. The first of these conditions is when the intrastate rate results in "undue or unreasonable advantage, preference or prejudice as between persons or localities in intrastate commerce on the one hand, and interstate commerce on the other hand." In considering this phase of Section 13 (4) of the Act, the Lower Court in the King Case expressed doubt as to the ability of the Commission to sustain its action on that ground and this Court placed no reliance upon the undue preference and prejudice feature in its opinion (Footnote 14, page 15 of advance opinion King Case). The Court in the Montana case held that the record did not support the finding of the Commission as to prejudice and preference. Because of the action in the King Case we assume no direction relative to findings of prejudice and preference against persons or localities is contained in the order remanding the case and we will not discuss this feature further.

II.

The Remanding of This Case for Further Proceedings in Light of the King Case, Considering the Decision of the District Court, Is Erroneous.

The order remanding this case for further proceedings in light of King vs. United States is apparently related solely to the second condition when the Interstate Commerce Commission may order state rates increased under Section 13 (4) of the Act. This condition, when state rates may be ordered increased, is where the state-made rate causes "any undue, unreasonable or unjust distrimination against interstate or foreign commerce." The Court's discussion of this condition is found on pages 13 to 21 of the advance opinion. On page 14, the Court said:

> "The Commission there finds that the maintenance of the existing intrastate rates within Florida 'on bases lower than those herein approved causes and in the future will cause, (1) in all instances, unjust discrimination against interstate commerce . . . .' 278 I. C. C. at 73. *If supported by adequate subsidiary findings, this ultimate finding thus sustains the authority of the Commission and the validity of its order.* North Carolina v. United States, 325 U. S. 507, 514; Florida v. United States, 292 U. S. 1; 282 U. S. 194; United States v. Louisiana, 290 U. S. 70). The court below adds that it is 'clear from the evidence in the case that it (the existing intrastate rate) did result in undue, unreasonable and unjust discrimination against interstate commerce . . . .'" 101 F. Supp. 941, 945. (Emphasis supplied)

It is noted that the Lower Court in the Florida Case found the evidence adequate to show discrimination. The Montana District Court, relying on North Carolina vs. United States, 325 U. S. 507, found that the evidence was insufficient to justify the order of the Commission. The statement from the North Carolina Case, supra, relied on and referred to is as follows:

"The foregoing cases also stand for the principle that the Interstate Commerce Commission is without authority to supplant a state-prescribed intra-state rate unless there are clear findings, supported by evidence, of each element essential to the exercise of that power by the Commission." (Emphasis supplied)

A study of the two opinions by the Montana District Court, 106 Fed. Supp. 778 and 786, shows that it fully considered the evidence. In its opinion of August 13, 1952, the Court said:

"The third argument made on behalf of the intervening Railroad defendants throws even further doubt upon the sufficiency of the Commission's findings. That argument is that the finding which our former opinion declared missing was wholly unnecessary. It was contended that since the Commission in Ex Parte 168 and in the proceeding here under review found that the Railroads here affected required additional revenues at the time the application in Ex Parte 168 was presented, and since it found that the Montana intrastate rates are now on a lower level that the interstate rates now found reasonable, the fact that both kinds of traffic moved under the same conditions, with costs inextricably commingled, requires a conclusion that the intrastate rates may be properly ordered brought in line with the interstate rates. Counsel who made this contention on behalf of the Railroads summarized his argument as follows: 'I think it is clear from what I have said earlier that in view of the woefully inadequate revenues of the Montana lines, the low level of Montana intrastate rates, the fact that operating conditions are the same, that a contribution of no greater percent from Montana intrastate traffic is not in excess of the amount needed by these lines to enable them to operate adequately and efficiently.'

"We find ourselves unable to go along with this argument. It appears to us to be an attempt to contend that the mere existence of a disparity between intrastate and interstate rates is sufficient to warrant the Com-

mission to prescribe intrastate rates. We think it sufficiently settled that 'the mere existence of a disparity between particular rates on intrastate and interstate traffic does not warrant the Commission in prescribing intrastate rates.' Florida v. United States, 282 U. S. 194, 211-212; North Carolina v. United States, 325 U. S. 507, 516. We think that counsel is attempting to sustain the order by what the Supreme Court called in the North Carolina case 'a very simplified form of proof.'

"Here there is no finding as in Florida v. United States, 292 U. S. 1, 9, that the intrastate rate scale 'was abnormally low and less than reasonably compensatory . . . . insufficient under all circumstances and conditions to cover the full cost of the service.' There is nothing in the record before us to disclose a finding that the increased interstate rates and the existing intrastate rates are not both within a 'zone of reasonableness'. (the term is from U. S. v. Chicago, M., St. P. & P. R. Co., 294 U. S. at p. 506).

"But the very fact that this argument thus rejected by us has been made here, suggests the possibility that the Commission accepted and acted upon a similar view. When that is considered there is brought to mind a special and peculiar reason why 'a high standard of certainty' must be required of findings in a case of this character. For, as stated by Mr. Justice Cardozo in U. S. v. Chicago, M., St. P. & P. R. Co., supra, at page 511, 'We must know what a decision means before the duty becomes ours to say whether it is right or wrong'. And as stated by Mr. Justice Douglas in U. S. v. Carolina Carriers Corp., 315 U. S. 475, 489, 'An insistence upon the findings which Congress has made basic and essential to the Commission's action is no intrusion into the administrative domain.' "

The Lower Court likewise pointed out that Section 8b of the Administrative Procedure Act (5 U. S. C. 1007b) requires that all decisions of the Commission must "include a statement of (1) findings and conclusions, as well as the

reasons or basis therefore upon all the material issues of fact, laws or discretion present on the record."

The King Case discusses the Commission findings in the Florida Case which are similar to those contained in the Report of the Commission in the Montana Case. (284 I. C. C. 167). The Court then said that "no question has been raised as to the adequacy of the evidence upon which any of the findings are based" (page 18). If there was evidence in the Montana Case to support the findings that Montana intrastate rates were unjustly or unduly discriminatory against interstate commerce this case would not be before this Court. Evidence to support the findings has been found lacking by the District Court. Under these conditions, the case should not be remanded for proceedings in conformity with a case divided on the basis of a special question not here present (passenger deficits) and on adequacy of findings only.

The Court, on page 18 of its opinion in the King Case, quotes from Illinois Commerce Commission v. United States, 292 U. S. 474, as support for the fact that evidence in a case under Section 15 (a) should likewise be applicable in a case under Section 13 (4). That case involved an investigation under both sections of the Act. (177 I. C. C. 669; 195 I. C. C. 89) and related to service in a small area. This case was distinguished by this Court in its footnote No. 5 in North Carolina vs. United States, supra.

We have previously discussed the inadequacy of the evidence and findings in Montana case in our Motion to Affirm. We ask the Court to again review the statements therein made, particularly pages 6 to 12 and 18 to 29 of the printed motion.

III.

The Decision in the Instant Case Is in Harmony with Controlling Decision and the Motion to Affirm Should Be Granted or in the Alternative the Case Should Be Placed on the Docket for Oral Argument.

Our reading of the Court Opinion in the King Case indicates that the evidentiary requirements in the North Carolina Case to support the findings is approved and is still the controlling decision.

In its opinion of July 24, 1952, the Montana District Court said:

> "We are well informed by the Commission's order itself that it thinks these increases 'ought to be made'. But as stated in the North Carolina case, they cannot be made unless the Commission by appropriate findings *based on evidence* states *why* they ought to be made." (Emphasis supplied)

Thus the question raised is not merely one of findings which were discussed in the King Case but one of the inadequacy of evidence. If the evidentiary requirements of the North Carolina Case are still required (and they appear to be approved in the King Case) then the judgment of the Montana District Court should be affirmed, or in the alternative the case should be placed on the docket for argument.

If on the other hand, the Court intends to approve the action of the Interstate Commerce Commission in raising intrastate rates solely on the basis of the Commission's actions and authority over interstate rates under Section 15 (a) of the Act and to set aside the rules pronounced in the North Carolina Case, it results in virtual overruling of the North Carolina case and effects amendment of Section 13 (4) of the Act as expressed by Congress and interpreted by the decision in that case. Such a drastic action should only be presumed when specifically stated. However, we are confident that the latter interpretation is the one which will be

urged by the Commission and by the railroads. Action by this Court on the Montana Case rather than remanding it under the conditions existing will prevent unnecessary confusion as to the possible conflict between the North Carolina Case and the recently decided King Case.

We believe Section 13 (4) of the Interstate Commerce Act is clear in its purpose and limitations and was correctly interpreted in the North Carolina Case and reaffirmed as to principle in the King Case. However, the King Case discusses primarily the adequacy of findings and not of evidence. From a reading of the Commission Report involved in the case (278 I. C. C. 41) and the Court opinion, there may well be doubt as to the evidence now required in a Section 13 case. This doubt should be removed at the first opportunity, in order to avoid confusion for the Interstate Commerce Commission, the state regulatory agencies, the railroads, the shippers and even Congress.

The Montana case specifically raises the question of adequacy of the evidence to support the findings. There is no evidence other than system financial figures, disparity of rates and a mathematical computation, based on an estimate as to the additional revenue which would be derived if the rates were increased, to support the findings of the Commission. While the evidence is that the increased rates would not exceed reasonable maximum rates, it is also shown that none of the rates are below minimum reasonable rates. There is no finding that the rates are abnormally low. The authority of the Interstate Commerce Commission is to remove "undue, unreasonable or unjust discrimination." Evidence in the record does not establish such forbidden discrimination. The Commission does not have authority to fix intrastate rates for any other reason, regardless of what may be considered a reasonable interstate rate. As we said before, if the evidence supported the findings, this case

would not be here. We refer to pages 6-12 of our printed Motion to Affirm and ask the Court to again consider the matters there stated.

Conclusion

We most respectfully submit that this petition for rehearing be granted; that the order vacating the judgment and remanding the case to the District Court for further proceeding in light of King v. United States, No. 9, October Term 1952, be withdrawn; that the judgment of the Lower Court be affirmed, or in the alternative that the case be placed on the docket for oral argument; and that in the meantime no mandate be issued by this Court.

ARNOLD H. OLSEN,
Attorney General of the State of Montana

H. M. BRICKETT,
Assistant Attorney General of the State of Montana

EDWIN S. BOOTH,
Secretary-Counsel for the Board of Railroad Commissions of the State of Montana and Special Assistant Attorney General of the State of Montana

Counsel for Appellees.

CERTIFICATE OF COUNSEL

I, Edwin S. Booth, of counsel for the above-named appellees, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

Dated December 31, 1952.

EDWIN S. BOOTH, *of Counsel*